No. 14774

In the United States Court of Appeals for the Ninth Circuit

ALBERT STAIN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF

Appeal from Judgment of Conviction by the United States District Court for the District of Oregon

C. E. LUCKEY,
United States Attorney for the District of Oregon

JAMES W. MORRELL
Assistant United States Attorney
of Attorneys for Appellee.

GLASS-KEYSTONE PRESS

INDEX

AUTHORITIES CITED

No. 14774

In the United States Court of Appeals

for the Ninth Circuit

ALBERT STAIN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

APPELLEE'S BRIEF

Appeal from Judgment of Conviction by the United States District Court for the District of Oregon

STATEMENT OF THE CASE

The appellant was tried by the Court, a jury having been duly waived, in the District Court for the District of Oregon on an indictment in one Count charging his violation of the Universal Military Training and Service Act, Title 50, USC Sec. 462, by wilfully refusing to submit to induction into the armed forces of the United States. At the beginning of the trial, it was stipulated that the appellant had been classified in class I-A by a Selective Service Board in the

State of Oregon which had jurisdiction over his classification, that he was thereafter ordered to report for induction into the armed forces on October 18, 1950, that he reported as ordered and at that time refused to submit to induction. It was further stipulated that the official Selective Service jacket covering the appellant's registration be introduced into evidence as government Exhibit No. 1. With the receipt of Exhibit No. 1, the government rested.

The appellant testified in his own behalf and no other witnesses were called. At the close of his case, appellant moved the Court for a judgment of acquittal upon six grounds (Tr. 27). It is from the denial of this motion and from the judgment and commitment entered April 21, 1955 that this appeal is taken.

Because the chronology of events leading up to this violation is of the utmost importance, it will be reviewed briefly here.

The appellant was born in Salem, Oregon in 1928 and first registered with the Selective Service system at Salem, Oregon on November 6, 1946. He made no claim at that time that he was a conscientious objector. Nor did he request that he be furnished with the Special Form 150 for the purpose of describing a claim to conscientious objector status. A short time after his registration he moved to Canada with his parents and took up residence there. On November 27, 1946 he was classified by his local board in class I-A and

a notification of this classification mailed to him. At no time did the appellant claim that he was a conscientious objector, nor did he ever appeal from the classification given him during this first registration. During February of 1947 the appellant notified his local board at Salem that he had changed his address and had moved to Canada.

The appellant thereafter returned to the United States and again took up residence in Salem, Oregon where on January 5, 1949 he again registered with a local board, this time under the Selective Training and Service Act of 1948. On Feburary 14, 1949 he was classified in class I-A and on February 17, 1949 was notified of this classification (Tr. 34). Over 18 months later on August 18, 1950 the appellant was ordered to report for his preinduction physical examination. He thereafter did report and was found to be physically fit for service. One month later, September 19, 1950, the appellant, for the first time since his original registration some four years before, asserted that he was conscientiously opposed to participation in war by reason of his religious training and belief. And it was on that date, September 19, 1950, that he asked for and received from the draft board a Form 150 on which he could state the reasons why he felt he should be given a classification other than I-A. On September 26, 1950 there was placed in the appellant's file a notation that the board had decided not to reopen the matter of his classification. On October 3, 1950 the appellant was ordered to report for induction and on October 18, 1950 he

appeared at the induction station and refused to be inducted.

After this matter was received in the United States Attorney's office for possible criminal prosecution, information was received by Selective Service Headquarters and the United States Attorney that the appellant would voluntarily submit himself for induction. On February 10, 1951 he was requested by letter to report for induction and on February 14, 1951 he advised his local board that he would not report. He was thereafter indicted, tried and convicted, and from that conviction appeals.

ARGUMENT

Appellant's brief is divided into three main sections, each describing an alleged error on the part of the local draft board which appellant claims deprived him of various rights under the law and regulations and resulted in the denial of procedural due process. Before discussing individually the points raised in appellant's brief, we wish here to present the government's contention that the trial Court committed no error in either its denial of appellant's motion or in its finding of guilty for the reason that the appellant was not entitled to have his classification reviewed by the Court and having stipulated that he was classified, ordered to report for induction and wilfully refused to be inducted, and having offered no defense other than that he was improperly classified, the Court had no alternative but to find that he was guilty as charged in the indictment.

The cases on this subject uniformly have held that a registrant has no right to have his classification reviewed by the Court in the criminal proceeding growing out of his refusal to be inducted unless he has exhausted all of his administrative remedies. The appellant here, although classified in class I-A in 1946 and again in 1949, never appealed that classification, nor did he ever request a personal appearance before the draft board for the purpose of explaining any deferment or reason for a classification other than I-A.

This Court had the same question before it in the case of *Williams* vs. *United States,* 203 F2d 85, Cert. denied 345 US 1003. The appellant in that case contended that the District Court erred in refusing to admit evidence that he had not been given a full, fair and impartial hearing by his local board and in refusing to review his classification. This Court there held that the District Court had not erred, and since he had not appealed the ruling of the board at the administrative level, he could not now be heard to object to his classification. The following language is particularly applicable here:

> "The administrative trial of the issues was before the Board. The Board ruled adversely to the appellant's claim and he did not avail himself of the right to appeal. After intentionally refusing to conform to the order of the Board the Selectee may not challenge his classification in the criminal prosecution for his failing to do so, since he also failed to pursue the appellate steps provided by the Selective Service Act. *Falbo* vs.

United States, 1944, 320 US 549." (203 F. (2) 85 at p. 87)

The *Williams* case also applies on another point raised by the appellant here relative to the local board's refusal to reopen appellant's classification and reclassify him. Williams registered with his local board September 7, 1948. He requested and received a conscientious objector form which he filed on November 1, 1948. On August 8, 1950 he was classified in I-A. He thereafter requested a personal hearing, and on September 1, 1950, after his hearing had been held, he was notified that his request for a conscientious objector classification had been denied and that he had been retained in class I-A. He did not appeal. On October 2, 1950 he was given an armed forces physical examination and found physically fit for service. The next day, October 3, 1950, he handed the clerk of his local board his statement in writing that he had been married since July 13, 1950. On appeal he asserted that the board had exceeded its jurisdiction by not ruling on his marital status and thereby prevented him from appealing from his classification in I-A.

This Court in dealing with that contention stated that, assuming the written information regarding his marital status constituted a sufficient written request for reclassification, *it came too late.* The following language quoted in part appears in the Selective Service Regulations:

> "Each classified registrant * * * shall, within ten days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, martial, military or dependency status, or in his physical condition." * * * (32 CFR Sec. 1625.1)

This Court in the *Williams* case went on to state the registrant's failure to notify the local board of his change in marital status within the time allowed constituted a waiver of any claim for deferment on the basis of such change in status.

The same situation exists in the case at bar. Here the appellant claims that the local board's refusal to reopen his file and consider his claim for reclassification as a conscientious objector deprived him of his right to appeal the classification, and his right to a personal appearance. But what appellant has overlooked is that his request for reclassification, if it can be classed as such, came much too late and the local board was not required to consider it. The local board put a notation in his Selective Service file on September 26, 1950, which in effect said just that. It said that the registrant, having made no objection to his classification, and having proceeded up to and through the physical examination stage of the induction process, can not now be heard to complain that his classification was incorrect. If this Court considered

a two-month lapse between classification and a request for reclassification too long a time under the regulations in the *Williams* case, certainly in the instant case a lapse of a year and a half, not to mention the prior classification in 1946, would be "too late" to expect the local board to reopen, reconsider and reclassify the appellant.

In reaching its decision not to reclassify the appellant, the local board was certainly not unmindful of the events that were taking place in the world at that time. Renewing these events briefly, it will be seen that Stain left the country very shortly after his first registration, November 6, 1946. On October 15, 1946 further inductions under the Selective Training and Service Act of 1940 had been suspended. Appellant registered again under the 1948 Act January 5, 1949, at a time when inductions were at a minimum. Then in June, 1950, began the Korean War and its resultant steep increase in inductions. In August, 1950, appellant was ordered to report for his physical examination and then for the first time did he assert that he was conscientiously opposed to participation in war due to his religious training and belief. That claim of conscientious objections was made almost four years after his first classification in I-A. It is submitted that the draft board was certainly justified in taking these circumstances into consideration in attempting to decide whether or not this registrant's classification should be reopened and his much delayed claim of exemption considered.

The lapse of time between the appellant's two classifications and his eventual assertion of a claim to conscientious objector status should be considered also in the light of his testimony at the trial. On direct examination he was asked where he got his conscientious objector beliefs, and he answered, "I have always had them—from the teaching of my folks and—well, it would be from childhood." (Tr. 21). That answer seems quite inconsistent with the appellant's failure to assert his conscientious objector beliefs until a year and a half after his latest classification at a time when he had taken his preinduction physical examination and at a time when the Korean War was well under way.

APPELLANT'S CONTENTIONS

The appellant claims in Contention No. I that he was deprived of his right to a personal appearance before his local board and that he was also deprived of his right of appeal from his I-A classification (Appellant's Brief, page 4). These statements appear to be inconsistent with the facts. On the reverse side of the Selective Service System Form 100 Classification Questionnaire filled out by the registrant in 1949 there appears a minute entry as follows: "2-17-49—Class I-A SSS Form No. 110 mailed to registrant" (Tr. 34). Selective Service System Form 110 is a standard classification form which advises registrant of the class into which he has been placed. It is authorized by Title 32, CFR Sec. 1626.2 (c) (1). Part of the Form 110 shows the Selective

Service class of the registrant and he is required to carry this card on his person. Form 110 contains in addition the following information:

> "Notice of right to appeal.
>
> "Appeal from classification by local board must be made within ten days after the mailing of this notice by filing a written notice of appeal with the local board.
>
> "Within the same ten-day period you may file a written request for personal appearance before the local board. If this is done, the time in which you may appeal is extended to ten days from the date of mailing the new notice of classification after such personal appearance."

The appellant received two of these forms containing the above quoted notice of right to appeal and right to personal appearance, one after his 1946 classification and one was mailed to him February 17, 1949 after his most recent classification. However, despite this notice, at no time did he appeal nor did he request a personal appearance before his board.

The doctrine that a registrant who fails to exhaust all of the administrative remedies accorded him under the Selective Service Act has waived any claim which he may have to a classification other than I-A is not new to this Court. In the case of *Olinger* vs. *Patridge,* 196 F2d 986, the registrant did not appeal his I-A classification within ten days and

made no effort to appear and discuss his classification until two years later, when upon the receipt of a notice to report for a physical examination, he appeared at his draft board and orally requested reclassification. In that case this Court stated:

> "The authorities are all to the effect that the judicial machinery may not be invoked until all administrative remedies have been unsuccessfully pursued. (Citing *Johnson* vs. *United States,* 126 F2d 242,) "Olinger's inaction does not exhaust his administrative remedies, but rather amounts to a waiver of any rights which he may have claimed under the Selective Service Act." (196 F2d 986 at p. 987)

Likewise in the *Williams* case cited above, it was held that the failure of the registrant to notify his local board of a change in his status within the time allowed constituted a waiver of any claim toward deferment on the basis of such change of status.

In the Eighth Circuit case of *Van Bibber* vs. *United States,* 151 F2d 444, the defendant failed to make an administrative appeal. The Court there stated:

> "Where a registrant disagrees with his board's classification and desires to have it changed, he must resort to the administrative remedies afforded him by the Act and the Selective Service Regulations at that stage of the Selective process. * * * 'The registrant may,' as the *Falbo* case (*Falbo* vs. *U. S.*) points out * * * 'contest his classification by a personal appearance before

> the local board and if the board refuses to alter the classification, by carrying his case to a board of appeal and thence in certain circumstances to the President.' If he does not resort to these administrative remedies or if his efforts to change his classification fail, he has no legal right to refuse to obey an order of his board to report. *Only when he has exhausted his administrative remedies, has been ordered by his board to report for induction, has obeyed that order and has been finally accepted for service, are the doors of the Courts open to him to test the legality of his classification.*" (151 F2d 444 at 446) Emphasis added.

Again the Eighth Circuit in *Johnson* vs. *United States,* 126 F2d 242, held that the Act and Regulations afford the registrant a proper and sufficient remedy by giving him a right to an appeal to the appeal board which has the power to undo any injustice or any mistake in classification, and the registrant *must* take an appeal as a further step in the administrative remedy open to him. It is only when administrative remedies have been exhausted that the Courts are available.

See also *United States* vs. *Dorn,* 121 F. Supp. 171, and *Mason* vs. *United States,* 218 F2d 375.

In appellant's Contention No. II he states that there was no basis in fact for his classification of I-A. Appellant, however, is overlooking the fact that the burden rests with the registrant to furnish information to his local board sufficient to warrant his being placed in a classification other than I-A.

This opportunity is given to every registrant in the classification questionnaire which he fills out at his registration. Series XIV in that form asks him if he is a conscientious objector, (Tr. 30) and it is incumbent upon the registrant to assert his claim to a classification other than I-A if he has one and to do it promptly. This was not done by the appellant until after he had been given his preinduction physical examination and found acceptable for military service, and at a time when the draft board was not required to give consideration to such a claim for reclassification.

It is the government's position that under the doctrine of the *Williams* case, *supra,* and the other cases cited in the Argument, the appellant is in no position to raise the point that the draft board acted without any basis in fact or to ask the Court to examine his classification in any other way, for he has not exhausted the administrative remedies given him under the Selective Service Act. As has been pointed out earlier, the cases uniformly hold that the registrant must exhaust these remedies before he can ask the courts to review.

Again in his Contention No. 3 the appellant attacks the Order to Report for Induction on procedural grounds, stating that the draft board has denied him his right to a personal appearance and his right to appeal. But we have already seen that after both registrations this appellant was notified of his classification on a form which contains a written notice that he has a right of appeal and a right to personal appearance which he must exercise promptly.

Both under Contentions No. 2 and No. 3 the appellant cites the case of *United States* vs. *Vincelli,* 216 F.2d 681, but it is the government's position that the *Vincelli* case differs so greatly from the case at bar that it is easily distinguishable and in fact was distinguished by the Court of Appeals for the Second Circuit in the decision itself when that Court discussed the *Williams* case, *supra,* and the case of *United States* vs. *Rubenstein,* 166 F.2d 249.

In the *Vincelli* case the registrant was classified I-A and made no claim that he was a conscientious objector. He thereafter became a Jehovah's Witness and wrote his draft board a letter stating that he wished to appeal from his I-A classification because he had become a Jehovah's Witness and was now a conscientious objector, whereupon the draft board sent him a Form 150 which he filled out and filed. Thereafter the board, considering the material submitted, voted unanimously not to reopen his classification and not to reclassify him as a conscientious objector and without notice to the registrant forwarded his file to the State Appeal Board. The registrant there claimed that the draft board had reopened his file, considered the merits of his conscientious objector claim, and had voted not to reclassify him and that thereafter had forwarded his file to the appeal board without any notice to him, thereby denying him his right to personal appearance on the new classification. The government contended that the *Vincelli* case fell within the rule of *Williams* vs. *United States, supra,* and the Court then dis-

tinguished between the *Williams* and *Vincelli* cases in the following manner:

> "We will assume arguendo that had the Local Board refused to reopen the appellant's classification on the ground that his application was too late and that his right to reclassification had been waived, the failure to notify him of its action would have denied him no substantial rights on appeal since an appeal would, by hypothesis, have been frivolous. But in the view of the Board's action which we interpret as a reopening and a denial of reclassification on the merits, it is now too late for the appellee to assert a previous waiver by the appellant of his right to have that done. * * * *Having undertaken to consider his application on the merits, the Local Board was bound to do that in the manner procedural due process required."* (216 F.2d 681.) Emphasis added.

In the case at bar there was no reopening and no consideration of the merits of the appellant's claim to conscientious objector status. The draft board made this very clear when it placed in his file on September 26, 1950, the statement that inasmuch as the appellant had been given a physical examination and found acceptable without protest, in other words had progressed that far in the induction process, the matter of his classification could not be reopened. At no time is there any indication that this local board ever considered his claim to conscientious objector status on the merits, nor was it required to do so.

CONCLUSION

The foregoing review of the facts in this case, together with the discussion of the law applicable as announced many times by this Court, makes inescapable the conclusion that the appellant was given ample opportunity to assert whatever claim he may have had to conscientious objector status during the course of his classification in 1946 and again in 1949 and although he claimed at the time of the trial to have had religious convictions against participation in war since childhood, he saw fit to raise no objections to his I-A classification until he reached the brink of induction and there was a excellent possibility that he might be called upon to serve his country due to the outbreak of the Korean War. There appears to be little question that under the law and applicable regulations this draft board was fully justified in refusing to consider the appellant's eleventh hour claim to reclassification and their statement in his file clearly reflects that his file would not be reopened because his claim was asserted much too late.

It is fundamental to the administrative process created by the Selective Training and Service Act and regulations that the burden of establishing a claim to exemption or classification other than Class I-A at all times rests with the registrant. It is equally well established that such claims must be asserted promptly in order that they may receive the thorough consideration required by the Act. It appears obvious that the Congress never intended that the selective

process be interrupted and delayed whenever a registrant felt that his induction was imminent and he would like to have his case reopened. Such a warped construction of the intent of Congress and of the Act and regulations would immediately render the Selective Service process wholly ineffective to supply this nation with the manpower so essential to the maintenance of a strong and continuing defense.

Based upon the foregoing it is therefore respectfully submitted that the trial court did not err and that its judgment of conviction should be affirmed.

C. E. LUCKEY, United States Attorney
for the District of Oregon

JAMES W. MORRELL,
Assistant United States Attorney
Of Counsel for Appellee.